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Arizona Corporation Commission

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Attorneys for Mountain View Ranch Development Joint Venture, LLC

**BEFORE THE ARIZONA POWER PLANT AND
TRANSMISSION LINE SITING COMMITTEE**

IN THE MATTER OF THE APPLICATION
OF SOUTHLINE TRANSMISSION LLC, IN
CONFORMANCE WITH THE
REQUIREMENTS OF ARIZONA REVISED
STATUTES 40-360, ET SEQ., FOR A
CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AUTHORIZING
CONSTRUCTION OF NON-WAPA-
OWNED ARIZONA PORTIONS OF THE
SOUTHLINE TRANSMISSION PROJECT,
INCLUDING A NEW APPROXIMATELY
66-MILE 345KV TRANSMISSION LINE IN
COCHISE COUNTY FROM THE
ARIZONA-NEW MEXICO BORDER TO
THE PROPOSED SOUTHLINE APACHE
SUBSTATION, THE ASSOCIATED
FACILITIES TO CONNECT THE
SOUTHLINE APACHE SUBSTATION TO
THE ADJACENT AEPCO APACHE
SUBSTATION, AND APPROXIMATELY 5
MILES OF NEW 138-KV AND 230-KV
TRANSMISSION LINES AND
ASSOCIATED FACILITIES TO CONNECT
THE EXISTING PANTANO, VAIL,
DEMOSS PETRIE, AND TORTOLITA
SUBSTATIONS TO THE UPGRADED
WAPA-OWNED 230-KV APACHE-
TUCSON AND TUCSON-SAGUARO
TRANSMISSION LINES IN PIMA AND
PINAL COUNTIES.

Docket No. L-00000AAA-16-0370-00173

Case No. 173

**MOUNTAIN VIEW RANCH'S
SUPPLEMENTAL MEMORANDUM OF
LAW**

1 Intervenor Mountain View Ranch Development Joint Venture, LLC ("MVR"), by
2 and through counsel and in response to the Chairman's request, submits the following
3 memorandum regarding the legal authorities discussed during Intervenor's closing
4 comments.
5

6 Section 1222 of the EPAct of 2005, 42 U.S.C. §16421, is the Congressional
7 authorization for WAPA to participate in the "public-private endeavor" with Southline
8 for the Southline Transmission Project.¹ Section 1222 contains a savings clause that
9 states:
10

11 Nothing in this section affects any requirement of... any Federal or State
12 law relating to the siting of energy facilities.

13 42 U.S.C. §16421(d)(2). Such savings clause provides the State of Arizona authority to
14 regulate the entirety of this "public-private endeavor", including WAPA's role in it and
15 the so-called WAPA sections of the Upgrade Section of the Project.
16

17 This is confirmed by the holdings in two Ninth Circuit decisions -- *U.S. v. 14.02*
18 *Acres of Land More or Less in Fresno County*, 547 F.3d 943 (9th Cir. 2008), and *Maun v.*
19 *U.S.*, 347 F.2d 970, 974 (9th Cir. 1965). The court in *14.02 Acres of Land* held that
20 WAPA, as a federal agency, is immune from local control unless it can be established
21 that Congress had directed that the agency subjects itself thereto. The Court cited *Maun*
22 as both the authority for such rule, and an example of a circumstance where such
23
24
25

26 ¹ *Application at 2-3.* As addressed in oral argument and shown by the record, the parameters of
this "endeavor" are yet unknown, and decisions regarding "ownership, operations, maintenance,
marketing, financing and land acquisition" have not yet been made. *WAPA R.O.D. (Hearing*
Exhibit 19.)

1 Congressional direction was established so as to subject the federal agency to local
2 regulation. 347 F.3d at 953.

3
4 In *Maun*, the court was faced with the issue of “whether [the Atomic Energy
5 Commission (AEC)] may construct and operate an overhead electric transmission line in
6 disregard of local authority and regulations governing the character and location of such
7 lines,” and the impact of the savings clause in the Atomic Energy Act. 347 F.2d at 974-
8 975. Such saving clause stated that:

9
10 Nothing in this section shall be construed to affect the authority or
11 regulations of any Federal, State, or local agency with respect to the
12 generation, sale, or transmission of electric power.

12 *Id.* at 974. The court concluded that the AEC was subject to the authority of and
13 regulations of state and local governments, because the purpose of the savings clauses
14 was:
15

16 to make it clear that the generation, sale or transmission of electric power
17 produced by nuclear means was to be subject to federal, state and local
18 authority and regulation to the same extent that electric power produced by
19 conventional means is subject to such a authority and regulation.

19 *Id.* at 976. As noted, such reasoning was found to be sound by the Ninth Circuit in *14.02*
20 *Acres of Land*, a case which applicant and others have cited as authoritative in other
21 submissions. The *Maun* court also observed that, if the line construction had been left to
22 the private partner, “that company would have been obliged to comply with the
23 ordinances in question” (347 F.2d at 978) – a circumstance that indisputably exists here.
24
25
26

1 It is also notable that, shortly after and in response to the 1965 decision in *Maun*,
2 Congress amended the savings clause in the Atomic Energy Act to add a proviso
3 expressly stating that:
4

5 *Provided*, That this section shall not be deemed to confer upon any Federal,
6 State, or local agency any authority to regulate, control, or restrict any
activities of the Commission.

7 *See, e.g., Boeing Co. v. Movassaghi*, 768 F.3d 832, 841 (9th Cir. 2014). In 1983, the
8 Supreme Court recognized that the intent and effect of such added language was to
9 overrule *Maun* and preclude local control. *Id.*, citing *Pac. Gas & Elec. Co. v. State*
10 *Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 210-211 (1983). The EPAct
11 of 2005 was adopted over twenty years later, and no such proviso is included in the
12 savings clause in §1222. The absence of such proviso, despite the long standing
13 decisions in *Maun* and *Pac. Gas & Elec. Co.*, is a compelling indication that State
14 regulatory control was purposely retained with respect to public/private WAPA projects
15 such as the one at issue here.
16
17

18 By statute, Arizona requires that “every utility planning to construct a plant,
19 transmission line, or both in this state must file with the [ACC] an application for a
20 certificate of environmental compatibility”, and that such application shall be referred for
21 review and decision by the transmission line siting committee. A.R.S. §§40-360, 360.03.
22 Utility is defined to include “any person engaged in the generation or transmission of
23 electric energy, and the term “facilities” includes transmissions lines. A.R.S. §40-360
24 (6,11). The line siting committee is empowered to impose conditions on the issuance of a
25 certificate, and is charged with considering certain factors as its basis for action,
26

1 including among other things "existing plans of ... private entities for other developments
2 at or in the vicinity of the proposed site."


3
4 In short, state regulation of public/private line transmission line expansion projects
5 was intended by Congress when WAPA's participation in them was authorized, and such
6 projects are within the regulatory mandate of the Arizona statutes. Abdicating
7 jurisdiction for portions of this project will leave a regulatory gap, set poor precedent for
8 future projects, and leave state and private landowners effected by the Upgrade Section
9 with few if any options to compel and enforce mitigation of the impacts of the Project.
10

11 Accordingly, MVR respectfully requests that the regulatory authority mandated by
12 A.R.S. §40-360 *et seq.*, and reserved to states pursuant to 42 USCA §16421, be exercised
13 for all portions of the Project, and not be limited to the "CEC Upgrade Section".
14

15 RESPECTFULLY SUBMITTED this 7th day of December, 2016.
16

17 JACKSON & ODEN, P.C.

18
19 By:


Todd Jackson
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21
22
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